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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
State Engineer, *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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State of Nevada, Intervenor-Appellant in the Circuit Court, respectfully prays that a Writ of Certiorari issue to revew the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 4, 1974.

OPINION BELOW

The opinion of the court below (Appendix A, pp. i-xviii) has not yet been reported.

JURISDICTION

The final judgment of the District Court of Nevada was entered on April 9, 1974, (Appendix B, pp. xix-xxii). The judgment of the Court of Appeals affirming the District Court's judgment was entered on December 4, 1974, (Appendix B, pp. xxii-xxiii). A timely petition for rehearing was denied on January 31, 1975. (Appendix B, pp. xxiii-xxiv). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The petitions filed by petitioners, Cappaerts, and the several amicus briefs expertly present to this Court the issues raised and considered in the Ninth Circuit Court decision concerning the authority of the Presidential Proclamation reserving Devil's Hole as a valid basis for reserving water rights and the question of *Res judicata* or collateral estoppel raised by petitioner, State of Nevada, in the lower court; therefore, it seems unnecessary to burden the Court with a repetition of these issues in this application. However, the issues concerning the state-federal conflict as to which government entity should make the determination of the existence and scope of an implied

water right is so vital to the entire State of Nevada and all semi-arid western states that petitioner, State of Nevada, is compelled to emphasize the necessity of a definitive decision on the issue.

The questions presented are:

1. Whether the authority for determining and administering water rights expressly granted to the State of Nevada by Congress can be subsequently precluded and ignored by the United States Government by automatically *implying* from every act of reservation of public domain land an underground water right to water beneath both reserved and adjacent non-reserved, private land.

2. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land.

STATUTES INVOLVED

The state and federal statutes involved in this case are set forth in Appendix C, pp. xxv-xxvii.

STATEMENT

Petitioners, Cappaerts, have set forth in their brief an extensive and detailed statement of the facts with particular emphasis on facts concerning the nature of the ranch, Devil's Hole, the pupfish and the background

of the Presidential Proclamation reserving Devil's Hole Monument, all of which petitioner, State of Nevada agrees with and it would serve no useful purpose to reiterate in total those facts. However, certain limited facts are worth repeating especially with regards to the action of the United States Government prior to the filing of its Complaint.

In April, 1970, prior to this action and pursuant to state law, appellants, Cappaerts, and their predecessor, Spring Meadows, Inc., filed application with the State of Nevada for appropriation of groundwater by means of wells designated in petitioners, Cappaerts', petition (page 8) as Nos. 5, 16 and 17.

Subsequently, the United States Government through the National Park Service protested in writing said application. A hearing in which the United States Government participated fully through counsel from the Solicitor-General's office, who presented evidence in the form of both witnesses and documents and following such made an extensive oral argument, was held on December 16, 1970. Following the hearing the State Engineer rendered his decision to issue the permits to petitioners, Cappaerts, to appropriate the groundwater. Approximately six months later on August 18, 1971, the United States Government filed in Federal District Court its complaint and motion for a preliminary injunction requesting an injunction be issued against petitioners, Cappaerts, to prevent them from pumping three of their wells, the basis for the complaint being that the pumping of the wells was lowering the water in Devil's Hole Monument to such

an extent that the survival of the Devil's Hole pupfish was threatened and any continuance of the pumping would result in extinction of the fish.

On June 30, 1972, petitioner, State of Nevada, filed a motion to intervene as a defendant and was granted leave to interplead on July 3, 1972.

Following entry of a preliminary and final injunction by the District Court recognizing an implied water right in the United States Government and restricting the pumping of water adjacent to Devil's Hole, notices of appeal were filed with the Ninth Circuit Court of Appeals by petitioners, the Cappaerts, and petitioner, State of Nevada.

Following the submission of briefs and oral argument, the final judgment of the Ninth Circuit Court of Appeals was entered on December 4, 1974, affirming the District Court's judgment on the ground that the reservation of Devil's Hole by the Presidential Proclamation issued pursuant to the authority of the 1906 Act for the Protection of American Antiquities (Act of June 8, 1906. See 306, 34 Stat. 225, now 16 U.S.C. §431-433) created an implied water right in the United States Government to all unappropriated water beneath reserved *and* non-reserved private land necessary to insure the survival of the pupfish; and further, holding that the United States Government is in no way bound by the state water laws in establishing such an implied water right.

REASON FOR GRANTING THE WRIT

1. Whether the authority for determining and administering water rights expressly granted to the State of Nevada by Congress can be subsequently precluded and ignored by the United States Government by automatically *implying* from every act of reservation of public domain land an underground water right to water beneath both reserved and adjacent non-reserved private land.

This case presents a classic and heretofore unresolved state-federal conflict in the highly critical area of determining the existence and administration of implied water rights. Only a very small number of cases have dealt with the "implied reservation" doctrine and, therefore, most of the issues concerning the application and scope of the doctrine remain unresolved.

The decision of the Ninth Circuit Court holding that the United States Government need not make any showing of need in order to establish in itself an implied water right and the further holding that the federal government need not comply with state water laws in order to assert and establish such a water right is directly in conflict with long-established applicable state law.

The Ninth Circuit Court decision affirming the judgment of the District Court affectively establishes the principle that the very act of reserving public domain land automatically creates a water right to groundwater beneath reserved and *private land* without regard to need which result flies directly in the face of the reasoning and background for the creation of the implied reservation doctrine. The decision also establishes the further principle that the state automatically loses control over water it previously controlled merely by the reserving of land whether such intent was expressed or not in the act of reservation.

The lower court decision affectively nullifies and is in conflict with several Congressional enactments and several United States Supreme Court cases which unequivocally hold that each state shall control all water on public domain land.

Between 1866 and 1877 Congress enacted several public land laws which were subsequently and judicially interpreted to mean that the existence, use and control of water rights on public domain land should be determined in accordance with local custom, law and court decision.

The first of these Congressional enactments was the Act of July 26, 1886, Ch. 262, §9; 14 Stat. 243 (now Act of July 10, 1952, Ch. 651, §208(a-2), 66 Stat. 560, 43 U.S.C. §661 (1938)), which specifically recognized the existence and validity of water rights acquired prior to the statute pursuant to local custom, law or court decision.

The United States Supreme Court confirmed this interpretation of the 1866 statute by holding that said statute was a Congressional recognition of the validity of water rights established pursuant to local custom.

Atchison v. Peterson, 87 U.S. 507 (1874); *Basey v. Gallagher,* 87 U.S. 670, 22 L.Ed. 452 (1874); and *Jennison v. Kirk,* 98 U.S. 453, 460 (1878).

A later, even more significant act in this regard was the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §321 (1958), which was judicially interpreted in 1936 to have severed, for purposes of private acquisition, soil and water rights on public lands, and further provided that such water rights were to be acquired in the manner provided by the law of the state of location, thereby judicially confirming that the water was under *public ownership. California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935); *Federal Power Commission v. Oregon,* 399 U.S. 435, 448 (1955). The Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* supra, said in interpreting the meaning of the Desert Land Act and the 1866 Act, "(T)he effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use as recognized by local rules and customs and the legislation and judicial decision of the arid land states, as the test and measure of private rights in and to the unappropriated water on the public domain."

In *Ickes v. Fox,* 300 U.S. 82, the Court held that by the Desert Land Act, "if not before, Congress had severed the land and water constituting the public domain and established the rule that for the future the lands should be patently separated . . . ; *but all non-navigable waters were reserved for the use of the*

public land under the laws of the various arid land states". Id. at 95. (Emphasis added) The Ninth Circuit Court in 1939 stated that the Act of 1866 was a formal confirmation of local laws and usage which had prior to said date met with acquiescence on the part of the federal government. *U.S. v. Walker River Irrigation District,* 104 F.2d 334 (CCA 9th 1939).

The Desert Land Act has also been interpreted as severing underground water, as well as surface water, from the land and, therefore, applying to all water on or under public land. *State v. Dority,* 225 P.2d 1007 (N. Mex 1950); *California Oregon Power Co. v. Beaver Portland Cement Co., supra.*

The 1866 and 1877 federal acts as subsequently interpreted by the courts are clear Congressional expressions that all water located on public land within a particular state is a subject of primarily local significance, and the rights to use such water should be determined, controlled and administered by the states. The above cases taken together constitute an unequivocal holding that the Desert Land Act and related statutes have transferred sovereign authority over water within these boundaries to the states thereby specifically rejecting the theory that the United States *owns* such water.

By 1913 Nevada, in line with the several cited Congressional enactments and judicial determinations, had adopted a comprehensive water code for surface water which establishes a systematic and orderly procedure for procuring the water rights thereto. Pertinent provisions appear in Appendix C, pp. xxv-xxvi.

A similar statutory scheme was adopted in 1939 for underground water and its pertinent provisions appear in Appendix C, p. xxvii.

The water right statutes of Nevada accord the same privileges to the United States Government as to any other public or private entity in making an appropriation of water. Ownership of real property is not necessary to support the right to use water. The various federal land acts declared all water situate on or under public domain land to be *publici juris,* and the Nevada court and legislature merely carried out that Congressional intent in its water code.

Despite the ramifications of this case and although the lower court clearly recognized the authority of the state over water on public domain land (Appendix A, pp. xiii), it failed in its decision to analyze in any substantive way the true basis for the creation and application of the "implied" reservation doctrine.

The lower court briefly answers the question of withdrawing expressly given state control over water on public land by implication by simply stating that the state water laws do not apply to "reservations" —lands withdrawn from the public domain—citing *Federal Power Commission v. Oregon,* supra, as the authority for its conclusion.

This position without any supporting analysis of the scope and ramifications of the doctrine results in our view in an unwarranted extension of the concept of the implied reservation doctrine. Thus, such an expansion of the doctrine clearly contradicts the ex-

pressed grant of control to the State of Nevada by the Acts of 1866 and 1877.

A close analysis of *Federal Power Commission v. Oregon,* supra, hereinafter referred to as the *Pelton Dam* case will demonstrate that the case is not support for the lower court's decision.

In the *Pelton Dam* case this Court for the first time in a water controversy case made a distinction between public domain and reserved land and then proceeded to state *without discussion* that all prior Congressional enactments with regard to water on the public domain are inapplicable to reserved land. Unfortunately, the Court avoided the effect of the long-standing and well-established principle that all water rights in water on public land shall be determined by state law by simply avoiding a discussion of the principle and making a heretofore unrecognized or undiscussed distinction between public domain and reserved land.

By grounding its decision on the *Pelton Dam* case the Ninth Circuit Court seems to say that when water is located on or below public domain land the state owns it, but if the federal government subsequently reserves the land, ownership of the same water is transferred back to the United States Government—even if by implication.

Specifically involved as a partial basis for the decision was the Federal Power Act, 49 Stat. 863 (1935) 16 U.S.C. §791-828(c) (1958), the provisions of which are not applicable to the present case. The Federal Power Act was an express pronouncement by Congress stating that certain land and the water on that

land should be used for purposes of establishing electric power sources for urgently needed electricity. The Act contains detailed provisions regulating the use of the water needed for the power project; therefore, the need to *imply* the intent to reserve water was not present in that case. The basis of the Court's opinion seems to be that by virtue of the property clause of the United States Constitution allowing the United States Government to own land that once ownership of the land is obtained or recognized, whichever the case might be, the right to water appurtenant thereto is established simply by virtue of the ownership.

Although the Court in the *Pelton Dam* case discussed the theory of ownership of land as creating a water right in the United States, all that was necessary to sustain the issuance of the license without state approval was the recognition that the Federal Power Act, as an expressed purpose of Congress to utilize certain water in furtherance of its constitutional power for the protection of the general welfare (U.S. Constitution, Art. I, §8-9), superseded the inconsistent provision of Oregon law. The real justification and effect of the *Pelton Dam* decision was that the purpose of the Federal Power Act to provide much needed electrical power for the general welfare of the people must take priority over the state's concern for the conservation of the fish.

A thorough analysis of the facts of each of the relatively few cases that have invoked the implied reservation doctrine establishes that said doctrine is based upon the concept of necessity, whether it is the

need to provide a living for the Indians (*Winters v. U.S.*, 207 U.S. 564; *Tweedy v. Texas Company*, 286 Fed. Supp. 383 (D. Mont. 1968)), or to provide much needed electrical power or to carry out the express power of Congress in providing for the national defense, *Nevada ex rel. Shamberger v. U.S.*, 165 Fed. Supp. 600 (D. Nev. 1951) and not upon the concept of ownership by virtue of ownership of the land. For example, in the case of *Tweedy v. Texas Company*, supra, one of two district court cases cited by the Ninth Circuit, the judge reasoned in between a substantial amount of dictum that what is reserved to the Indians is not the ownership of the water, but the right to use it for the purpose of satisfying a need. The concept well established in the United States Supreme Court cases interpreting the various land acts that all water within a particular state on public land belongs to the public and rights thereto are to be adjudicated and administered by the state of location is simply incompatible with the basic theory of ownership in any particular person or entity. The theory that the United States Government is the *owner* of water by implication is not supported by any prior decision of this Court.

This case is undoubtedly a classic confrontation between economics and environment, but its effects are not confined to a small area but touch the entire State of Nevada—indeed, as pointed out in petitioners, Cappaerts', petition, all the semi-arid states. (Cappaert Petition for Certiorari, p. 10)

Until the doctrine was applied in this case, no one could point to a case where the implied reservation

theory resulted in demonstrable injustice; however, we have now reached that result. Carrying the decision of the Circuit Court to its logical conclusion it must be stated that as a practical matter in any conflict between the needs of man and the needs of fish, the fish have priority. Nothing is said about the possible extinction or accelerated evolution of man if by the greatly expanded extension of the applied reservation doctrine man finds it virtually impossible to live because of the priority given to other species.

2. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land.

The practical effect of the lower court's decision is to create a new, dual and overlapping water rights adjudication and administration system. This results despite the fact that there is no federal system for the adjudication and administration of water rights comparable to the long-standing state systems. If the lower court decision be allowed to stand, the recognized certainty in establishing the nature and scope of water rights which has resulted from the tested and proven state system will virtually disappear.

Sound administration of the vital area of water rights dictates that the determination, adjudication and administration of *all* water rights whether appropriative, riparian or implied must be within the confines of the existing state statutory schemes. Several federal district courts have stated that what water rights the United States may have and the

extent thereof must be determined by the law of Nevada. *U.S. v. Agnnen,* 300 Fed. Supp. 256 (D. Nev. 1968); *U.S. v. Humboldt Lovelock Light and Heat,* 97 F.2d 38 (9th Cir. 1938).

The Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), 295 U.S. 142 (1935), laid the groundwork for state control when it provided for judicial acceptance of the Congressional policy, exerted through the various federal land acts, that water rights being essentially a local problem could be best handled in accordance with the state's own custom and law. This policy established the principle that the states should determine water rights unless Congress *expressly* stated otherwise.

In 1952 in an obvious attempt to waive its sovereign immunity and to give the states the power to adjudicate and administer water rights involving rights claimed by the United States Government, Congress passed as part of the Department of Justice Appropriation Act of July 10, 1952, Ch. 651 §208(a)-(c), 66 Stat. 560, 43 U.S.C. §666 (1970), the so-called McCarran Amendment (Appendix C, p. xxv).

In holding that the United States Government need not comply with and exhaust state procedures for determining its implied water rights because the McCarran Act requires the United States to be a party defendant and only then is the United States subject to state law, the lower court gave no consideration at all to the effect and meaning of two recent decisions of this Court which set forth certain principles regarding the state's adjudication of water rights. *U.S. v. Dis-*

trict Court for Eagle County, 401 U.S. 520, 28 L.Ed. 278, 91 S.Ct. 998 (1971); *U.S. v. District Court for Division No. 5,* 401 U.S. 527, 28 L.Ed.2d 284, 91 S.Ct. 100 (1971).

In *U.S. v. District Court for Eagle County,* supra, this Court held that any federal questions presented in a state water adjudication proceeding could be decided originally by the state subject to review in a federal court. This Court further went on to hold that the United States Government's claim to reserved water rights, implied or otherwise, was subject to adjudication under state law by virtue of the McCarran Amendment by stating:

> "(W)e deal with an all-exclusive statute concerning the adjudication of right to the use of water of a river system which in section 666(a)(1) had no exceptions and which, as we read it, includes appropriative rights, riparian rights, and *reserved rights*".

The federal government in the *Eagle* case also argued that its claimed reserved rights should not be subjected to the state proceedings because such implied rights may conflict with state appropriative rights which are inconsistent with reserved rights, but this Court rejected the argument and clearly recognized the jurisdiction of the state to make a determination of the existence and extent of reserved rights by saying:

> "All *such questions,* including the volume and scope of a particular reserved right, are federal questions, which, *if preserved,* can be reviewed here after final judgment by a Colorado Court". (Emphasis added)

In *U.S. v. District Court for Division No. 5,* supra, a companion case to the *Eagle* case, this Court again reiterated its position that the states were perfectly capable of determining and adjudicating all federal water claims regardless of how they might arise. Neitheir case indicates nor implies that there is any exception to this jurisdiction. It seems apparent from the reasoning in these two cases that this Court intended that the determination and administration of all federal water rights, including reserved rights, be in the state under the long-established state procedures in order to eliminate the perplexities, conflicts and uncertainties obvious in a system of dual jurisdiction of water matters. This seems especially supportable in light of the fact that there is no federal system for the adjudication and administration of water rights comparable to the state system.

To carry the reasoning of the Ninth Circuit Court to its natural conclusion means that under the new, fuzzy, judicially created dual system, whoever arrives first at the courthouse of its choice will determine the jurisdiction for determining water rights.

To key the availability of state procedures to determine the federal government water rights to the word, *defendant,* in the McCarran Act places an intolerable burden on the State of Nevada in light of its administrative adjudication procedure which, as do several other states, substitutes in the first instance in place of a court a state engineer, expert in the area of water (Appendix C, Ch. 534, Nevada Revised Statutes, §534.020). The engineer's decisions are subject to judicial review by the district court (Appendix C,

N.R.S. 533.450). In order to establish and maintain any certainty in terms of scope of use in its grant to a private user of the right to use well water on land adjacent to reserved land, the State of Nevada would be required to file a court action each time in order to qualify the United States Government as a defendant, which would under the reasoning of the lower court decision then allow the state to determine the question of implied water rights on reserved land.

A close reading of the reasoning behind the conclusions of the *Eagle* case, supra, does not support the proposition that the United States does not have to perfect its water rights pursuant to state law. In fact, considering the holding of the case that the states do have the right to adjudicate federal water rights, and viewed in the light of the historical development of water law, it is more reasonable to conclude that the case supports the proposition that the state should initially determine all water rights whether private, state or federal. This conclusion would seem even more reasonable in light of the fact that only the states have an established procedure for such determination. The substantive principles for determining the existence of reserved rights can be applied through state procedures subject to federal court review. Such a result resolves most of the uncertainty and unanswered questions which exist under the theory that the United States Government could, at any time it desires by virtue of unilaterally invoking the implied reservation doctrine, exercise exclusive control over water on or under reserved and non-reserved land.

Absent a federal water law, the only alternative to recognizing the state's right to determine and administer water rights is the use of a special master appointed by the federal district court in each and every case. Would the special master be discharged after each case? If a dispute arose as to violation of court decree, would new masters be appointed? Who would pay the cost? Numerous problems are created if this system becomes the accepted system for adjudicating and administering federal water rights.

CONCLUSION

For the foregoing reasons petitioner, State of Nevada, respectfully urges this Court to act to clarify the many unresolved procedural and substantive issues which have been raised by the implied reservation doctrine and vitally affect substantially all of the western states.

Dated, April 16, 1975.

Respectfully submitted,

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(Appendices Follow)

APPENDIX

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Appendix A—Opinion Below

Appendix B—Judgments Below

1. Final Decree of District Court
2. Judgment of Affirmance
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2. State Statutes
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   (b) Nevada Underground Water Act (NRS Ch. 534)

Appendix A

OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants, State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant, No. 74-2186.

OPINION

Appeal from the United States District Court for the District of Nevada.

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, Judge:

Pupfish (cyprinodon diabolis) live in Devil's Hole, in the Death Valley National Monument in Nevada. They are a unique and endangered species. In an action filed by the United States (Government) to protect these fish, the district court limited the amount of

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

water which the owners of a nearby cattle ranch may pump. The Cappaerts, owners of the ranch, and the State of Nevada, which intervened on the side of the Cappaerts, appeal.

The Cappaerts' ranch consists of 12,000 acres, of which 4,000 acres are in cultivation. The ranch, which represents an investment of more than 7 million dollars, has an annual payroll of more than $340,000 and employs more than 80 people. Between 1700 and 1800 head of cattle are fed on the ranch.

The Cappaerts drilled wells and pump groundwater[1] on their land for irrigation. Devil's Hole, a part of the Death Valley National Monument, is located within three miles of several wells on the ranch. Devil's Hole consists of a 40-acre tract in which there is a deep limestone cavern. At the bottom of this cavern there is a pool about 65 feet long, 10 feet wide, and more than 200 feet deep. There are steep rock walls on three sides of the pool, but on the fourth side there is a sloping rock shelf on which algae grows. This pool is part of the 4,500 square mile groundwater system from which the Cappaerts pump their water.

The Devil's Hole pupfish live in this pool. These pupfish evolved after the Death Valley Lake System dried up isolating this species of fish from its ancestral stock. The pupfish population varies from 200 in the winter to 800 after spawning in the spring and depends for its survival on the sloping rock shelf

[1]In this opinion "groundwater" will be used synonymously with "underground water".

which provides food and a spawning ground. The Devil's Hole pupfish are less than one inch long and do not exist anywhere else in the world. They have been designated an endangered species under the Endangered Species Act of 1973, 16 U.S.C. § 1533 (1974), 50 C.F.R. § 17.

The water level in the pool is measured from a copper washer which the U.S. Geological Survey placed on the shelf in 1962. Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level[2] steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed. At 3.6 feet below the marker, 42 per cent of the shelf is exposed, and at 3.7 feet the exposure increases to 55 per cent. The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chance to survive.

On June 5, 1973, following a number of hearings, the court granted the Government's motion for a preliminary injunction. This injunction required that pumping on the Cappaert's ranch be limited so that the mean water level of 3.0 feet below the copper washer be attained within 90 days. The court also appointed a special master to control the pumping of other wells in order to reach and maintain this water level.

[2]The Cappaerts pump water only from March to October. During the rest of the year the water level is higher.

Among the extensive findings entered by the District Court were the following:

> "9. Through the Presidential Proclamation of January 17, 1952, and its publication in the Federal Register on January 23, 1952 (17 Fed. Reg. 691), the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation as against the United States and reserved to the extent necessary for the requirements and purposes of the said reservation."
>
> "The purposes of the reservation of Devil's Hole as part of Death Valley National Monument includes the preservation of the pool of water and the preservation of the Devil's Hole pupfish (Cyprinodon diabolis) which live therein."
>
> "14. The natural rock shelf and rubble thereon on which the Devil's Hole pupfish depend for feeding, reproduction and, hence their survival, is nearly 100% covered with water when there is a mean water level of 3.0 feet below the copper washer."
>
> "16. The defendants' pumping of groundwater from wells known as Nos. 1, 2, 3, 4, 5 and 6, and 16 and 17, has drawn water from the springs and underground sources which comprise the supply for Devil's Hole. Because the defendants' wells and Devil's Hole are hydraulically connected, defendants' pumping has caused the water level in Devil's Hole to drop."
>
> "24. In order to maintain a viable continuous population of Devil's Hole pupfish, the water level in Devil's Hole must be maintained above the natural rock shelf and the rubble thereon, which is a minimum of not less than 3.0 feet below the copper washer."

> "25. If the water level at Devil's Hole drops below 3.0 feet below the copper washer, the survival of the Devil's Hole pupfish will be threatened, that is, the time of their becoming extinct in the natural evolutionary order will be accelerated."

Both the Cappaerts and the State of Nevada appealed. The Cappaerts also filed motions to modify, pending appeal, the preliminary injunction to permit them to pump down to the 3.7 feet below the copper washer. Pending appeal, this Court permitted the Cappaerts to pump so long as the water level did not go lower than 3.3 feet below the copper washer.

On January 17, 1952, President Truman, by Presidential Proclamation 2961, withdrew Devil's Hole from the public domain and made it part of the Death Valley National Monument. U.S. Code Cong. & Adm. News, 82d Cong., 2d Sess., Vol. 1 at 964 (1952); 17 Fed. Reg. 691. The Proclamation was issued under the Act for the Preservation of American Antiquities, 16 U.S.C. § 431 (1974), which authorizes the President to declare ". . . objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ."

The Government contends that the Proclamation, with its express reservation of the Devil's Hole pool and the surrounding land from the public domain, contains an *implied* reservation of enough groundwater to assure preservation of the pupfish in that pool.

The implied reservation of water doctrine originated in *Winters v. United States,* 207 U.S. 564 (1908).[3] The Court in *Winters* held that private landowners could not impair Indian rights in a river which formed one boundary of a reservation, even though the Congressional grant of the land to the Indians had not mentioned water rights. The land reserved for the Indians was arid. The Court held that a grant of water rights must be implied because Congress intended by the grant of land to encourage the Indians to become farmers.

In *Arizona v. California,* 373 U.S. 546, 601 (1963), the Supreme Court extended the reservation doctrine of *Winters* to include waters reserved for federal lands which had been set aside for recreation, wildlife, or forests. This was reaffirmed and extended in *United States v. District Court for Eagle County,* 401 U.S. 520, 522-23 (1971). There the Court held that the Federal Government's authority "to reserve waters for the use and benefit of federally reserved lands . . ." extended to "any federal enclave."

The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water

[3]It was established before *Winters* that the Federal Government has the power to reserve waters which are needed for federal lands and to exempt those waters from appropriation under state laws. *United States v. The Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703, 706 (1899); *United States v. Winans,* 198 U.S. 371, 383 (1905). In those cases, however, the Government had expressly dealt with water rights.

rights, the reservation of water doctrine is not so limited.

Two cases in the Ninth Circuit approved the application of the reservation of groundwater when it clearly appeared that water was needed to accomplish the purpose of the reservation. *Nevada ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), *aff'd on other grounds,* 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.,* 286 F.Supp. 383 (D. Mont. 1968).

In our view the United States may reserve not only surface water, but also underground water.[4]

The Cappaerts assert that the 1952 Presidential Proclamation was intended to preserve only the Devil's Hole pool with its unique limestone formation and not to protect the pupfish, and that therefore there was no implied reservation of groundwater. We reject that argument.

The Proclamation added the Devil's Hole pool to the Death Valley National Monument after reciting:

> "WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original

[4]It is interesting that Nevada administers its water laws so as to provide that rights to groundwater can be perfected just as readily as rights to surface water.

ancestral stock that in Pleistocene times was common to the entire region; and

"WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection. . . ."

The fundamental purpose of the reservation of the Devil's Hole pool was to assure that the pool would not suffer changes from its condition at the time the Proclamation was issued in 1952; that condition included the pool's unique inhabitants, the pupfish. The Proclamation referred to the significant contribution of the pupfish to the scientific importance of the Devil's Hole pool; it implicitly reserved enough groundwater to assure preservation of the pupfish. This conclusion is reinforced by the National Park Service Act, 16 U.S.C. § 1 (1974), which states that "the fundamental purpose" of all national parks and monuments is ". . . to conserve the scenery . . . and the wild life therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."

The Cappaerts contend that under Nevada law they have ownership rights to the underground water which can only be taken from them by eminent domain. They assert that the 1952 Presidential Proclamation attempted to reserve underground water which belonged to their predecessor in interest.

In 1890 and 1892, the State of Nevada by selection acquired fee simple title from the United States Government to the land now owned by the Cappaerts. The Desert Land Act of 1877, 43 U.S.C. § 321 (1964), as construed in *California-Oregon Power Co. v. Beaver*

Portland Cement Co., 295 U.S. 142, 162 (1935), provides that a transfer of federal land out of the public domain after the date of the Act would not pass title to any unappropriated appurtenant water; water rights would be determined under the law of the state in which the land was located. Because water rights were severed from title in 1877, Nevada got no water rights in 1890 and 1892 when it acquired title to the Cappaerts' land. Therefore, the Cappaerts, as successors in interest, possess no water rights unless they or a predecessor acquired such rights under Nevada law.

The Cappaerts argue that Nevada has adopted the old common law doctrine, established in *Acton v. Blundell*, 12 M. & W. 324 (Exch. Chamber 1843), that a landowner has unlimited dominion over all waters beneath his property. This doctrine, the Cappaerts contend, establishes their water rights as a matter of Nevada law.

The Supreme Court of Nevada in *Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885), repealed that common law doctrine. The court adopted and applied the theory of prior appropriation[5] as the basis for determining water rights. The doctrine of prior appropriation was reaffirmed in *Reno Smelting, Milling &*

[5]Under the doctrine of prior appropriation, the first person to possess by beneficial use water for domestic purposes, mining, agriculture, or manufacturing has vested and accrued rights to the water as against any later appropriators. The central principle of the doctrine is beneficial use of water, not land ownership. *Atchison v. Peterson*, 87 U.S. 507 (1874); Powell, Real Property, Vol. 5, ¶734, page 442.

Reduction Works v. C. C. Stevenson, 20 Nev. 269, 282, 21 P. 317 (1889).

In 1913[6] and 1939,[7] Nevada enacted statutes providing that, subject to existing rights, all waters in Nevada belong to the public and may be appropriated as provided by statute, and not otherwise. Because no one had previously appropriated water rights through beneficial use, there were no "existing waters" to water on the Cappaerts' land in 1939. Thereafter, water rights could only be acquired, as the statutes provided, by obtaining a permit from the state. N.R.S. 533.325.

The constitutionality of the basic principles of the Nevada Water Code was upheld in *Humboldt Lovelock Irrigation Light & Power Co. v. Smith,* 25 F.Supp. 571 (D. Nev. 1938). Such statutes which abolished common law water rights when the landowner had not made actual beneficial use of the water were held to be a valid exercise of the police power. *California-Oregon Power Co. v. Beaver Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), *aff'd on other grounds,* 295 U.S. 142 (1935).

Here neither the Cappaerts nor their predecessors made actual beneficial use of water until 1968. Even

[6]N.R.S. 533.030. Appropriation for beneficial use.
"1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise."

[7]N.R.S. 534.020.
"All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise."

if they had some common law claim, they had not established a vested property right in the water based on prior appropriations before Nevada declared that groundwater belonged to the public.

Finally, the Cappaerts contend the Government is estopped from enjoining them from the unrestricted use of their wells located more than one mile from Devil's Hole. In 1969, the Cappaerts and the Government entered into a land exchange. The Cappaerts received land within one mile of Devil's Hole under a patent granting them "all rights, privileges, immunities and appurtenances . . . subject to any vested and accrued water rights for mining, agriculture, manufacturing or other purposes. . . ." The Cappaerts have drilled wells and pumped water on this land.

The Cappaerts admit they had no oral understanding with the Government agents about the water pumping, and they further admit that these agents made no oral representation. The Cappaerts argue, however, that the Government knew at the time of the land exchange that water wells would be drilled, but that the Government specified only that no wells should be drilled within one mile of Devil's Hole. The Cappaerts say that they spent large sums of money in drilling the wells and in changing their farming operations, relying on their justifiable belief that they could drill wells and pump water without limitation.

This contention lacks merit. Estoppel cannot be invoked against the Government under the facts of this case. The statement of Mr. Justice Black in *United*

States v. California, 332 U.S. 19, 40 (1947), is particularly appropriate here.

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

The rule that estoppel may not be invoked against the Government in cases involving public lands is set out in the excellent opinion of Judge Barnes in *Beaver v. United States,* 350 F.2d 4 (9th Cir. 1965).

Even if the doctrine of estoppel were available against the Government, it could not be applied here because there were no misleading statements or conduct that would give rise to an estoppel between private parties. Here the Government is not asking the Cappaerts to stop pumping but only to limit pumping to the level at which the pupfish can survive.

The State of Nevada, as intervenor, has asserted additional grounds for reversal.

Nevada contends that the federal government is bound by state water laws, and that the rights which the Government asserts here were not acquired in conformity with state law. Under the Nevada law in effect in 1952, water rights could only be perfected by the issuance of a permit by the State Engineer.

The Government asserts that its rights were established by the implied reservation in the Presidential Proclamation of 1952 and that the United States is not bound by state water laws when it reserves land from the public domain. We agree.

The Desert Land Act of 1877, *supra,* severed soil and water rights on "public lands" and provided that such water rights were to be acquired in the manner provided by the law of the state of location. *California-Oregon Power Co. v. Beaver Cement Co., supra* at 162. But state water laws do not apply to "reservations"—lands withdrawn from the public domain. *Federal Power Commission v. Oregon,* 349 U.S. 435, 444, 448 (1955).

We hold that the Proclamation of 1952, which withdrew the Devil's Hole pool from the public domain, implicitly reserved the waters necessary to sustain the pupfish and legally established the Government's rights as against any future appropriation.

Nevada next contends that the District Court did not have jurisdiction to adjudicate the water rights in this case. Nevada argues that the Government must exhaust state procedures for determining water rights before going to a federal court. There is no merit in this contention.

Nevada relies on the so-called McCarran Amendment, 43 U.S.C. § 666 (1964).[8] That statute waives

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[8] "Suits for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of

the sovereign immunity of the United States in certain cases involving adjudication of water rights. The waiver enables states to adjudicate competing claims for water rights in certain cases in which the United States is one of the claimants.

The McCarran Amendment was enacted to waive sovereign immunity when the United States is a defendant in a state or federal action so that water rights may be fairly and fully adjudicated. Congress did not intend to limit the forums available to the United States as a plaintiff by narrowing federal court jurisdiction. In *United States v. Nevada et al.*, 412 U.S. 534, 538 (1973), the Supreme Court noted that the District Court had jurisdiction to hear a case brought by the United States involving competing claims to water rights.

Nevada also contends that even if the District Court had concurrent jurisdiction with the state courts, the doctrine or res judicata bars the Government from

water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided, That no judgment for costs shall be entered against the United States in any such suit.

Service of summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

collaterally attacking the decision of a state administrative body—here the State Engineer.

In April, 1970, the Cappaerts applied to the State Engineer for permits to use groundwater from several wells.[9] The United States was not a party to these proceedings, nor was it ever served with process. Nevertheless, employees of the National Park Service learned of the applications through a public notice. A field solicitor for the National Park Service protested the applications because extracting groundwater would lower the water level in the Devil's Hole pool and might endanger the pupfish.

At the hearing held before the State Engineer in December, 1970, the solicitor explained the geological and hydrological bases for the Government's concern. He asked that the Cappaerts' applications be denied or postponed pending furter scientific studies. The solicitor did not raise the jurisdictional issue or any of the legal issues which the United States had the right to assert.

In August, 1971, the Government filed this action in District Court to enjoin the Cappaerts from infringing on the Government's water rights at Devil's

[9]Sections 534.050 and 534.080 of the Nevada Revised Statutes both provide that rights to use groundwater must be obtained in compliance with Chapter 533. That chapter provides that a person who wishes to appropriate public water for his use must file an application with the State Engineer and must then publish notice of the application. N.R.S. 533.325 and 533.360. Interested persons may protest the application, and the application and protest may be considered at a hearing by the State Engineer. N.R.S. 533.365. The application may be refused if to grant it would be "detrimental to the public welfare". N.R.S. 533.370.

Hole. Nevada contends that the State Engineer's decision is res judicata and this action is therefore barred. We disagree.

The State Engineer did not have the authority to adjudicate the water rights of the United States because the United States did not waive its sovereign immunity.

Nevada's reliance here on the McCarran Amendment[10] is misplaced. The McCarran Amendment was enacted to waive the sovereign immunity of the United States in cases in which the presence of the United States as a party was necessary to the full and fair adjudication of competing claims to water rights. The Supreme Court in *Dugan v. Rank,* 372 U.S. 609, 618 (1963), interpreted that statute to waive soverign immunity only in ". . . a case involving a *general* adjudication of 'all the rights of various owners on a given stream,' . . . ." *See State of California v. Rank,* 293 F.2d 340, 346 (9th Cir. 1961). The Senate Report on the bill which became the McCarran Amendment shows the type of adjudication which was contemplated by Congress. The Report contained the following excerpt from *Pacific Live Stock Co. v. Lewis,* 241 U.S. 440, 447 (1916):

> ". . . All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights. . . ." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951).

[10]See Footnote 8, *supra.*

The proceeding before the State Engineer of Nevada was not a "general adjudication". The United States was not required to appear and prove its water rights to prevent forfeiture of its claims; the water rights of the United States were not in issue. The United States appeared only to explain the factual basis on which it opposed the Cappaerts' applications.

Furthermore, the McCarran Amendment waives sovereign immunity only in cases in which the United States is a defendant and has been served with process. The United States was neither a defendant nor served with process in the proceedings before the State Engineer.

Even if the United States had waived its sovereign immunity, we are not bound to give res judicata effect to the decision of an administrative body in a case of this kind. As the court said in *Grose v. Cohen,* 406 F.2d 823, 824 (4th Cir. 1969):

> "*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. . . . Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, . . . but practical reasons may exist for refusing to apply it, e.g., United States v. Stone & Downer Co., 274 U.S. 225 (1927). And in any event, when traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958)."

Although the State Engineer may have expertise in the administration of Nevada's water laws, there is no

evidence that he is qualified to consider or decide the complex issues of federal law involved in this case. The State Engineer's decision is not entitled to res judicata effect in this action.

We affirm the decision of the District Court. The District Court held the water level should be maintained at 3.0 feet below the copper washer in order to preserve the pupfish in the Devil's Hole pool. Pending this appeal, we permitted the Cappaerts to pump as long as the water level did not go below 3.3 feet. We remand this case to the District Court to determine whether, on the facts developed during the pendency of this appeal, the lower water level may be adequate to preserve the pupfish.

We direct the District Court to retain continuing jurisdiction so that it may promptly act if a change in water level is required to preserve and protect the pupfish in the Devil's Hole pool.

AFFIRMED and REMANDED.

Appendix B

JUDGMENTS BELOW

1. Final Decree of District Court

In the United States District Court
for the District of Nevada

Civil LV-1687

United States of America,	Plaintiff,
vs.	
Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, individuals, and Spring Meadows Ranch,	Defendants.

[Filed Apr. 9, 1974]

FINAL DECREE, ORDER CONTINUING APPOINTMENT OF SPECIAL MASTER, AND AWARD OF COSTS

I.

Final Decree

This action having been submitted to this Court on plaintiff's application for a permanent injunction seeking to enjoin the defendants from pumping, except for domestic purposes, from wells Nos. 1, 2, 3, 4 and 5, located in Section 7, T. 18 S., R. 51 E.; well No. 6, located in Section 3, T. 18 S., R. 50 E.; wells

Nos. 16 and 17, located in Section 8, T. 18 S., R. 51 E.; all other wells now existing or hereafter drilled within Section 28, 33 and 34, T. 17 S., R. 50 E.; within Sections 31 and 32, T. 17 S., R. 51 E.; within Sections 2, 3, 4, 9, 10, 11, 12, 13, 14 and 15, T. 18 S., R. 50 E.; and within Sections 5, 6, 7, 8, 17 and 18, T. 18 S., R. 51 E.; M.D.B.&M., and the Court having considered the pleadings, the affidavits, the testimony, the exhibits, the briefs, the oral argument of counsel, its findings of fact, conclusions of law and preliminary injunction of June 5, 1973, and having concluded that a permanent injunction should issue,

It Is Ordered, Adjudged and Decreed that, except for domestic purposes, the defendants are forthwith permanently enjoined as follows:

To limit the pumping from underground waters from wells Nos. 1, 2, 3, 4 and 5, located in Section 7, T. 18 S., R. 51 E.; well No. 6, located in Section 3, T. 18 S., R. 50 E.; wells Nos. 16 and 17, located in Section 8, T. 18 S., R. 51 E.; all other wells now existing or hereafter drilled within Section 28, 33 and 34, T. 17 S., R. 50 E.; within Sections 31 and 32, T. 17 S., R. 51 E.; within Sections 2, 3, 4, 9, 10, 11, 12, 13, 14 and 15, T. 18 S., R. 50 E.; and within Sections 5, 6, 7, 8, 17 and 18, T. 18 S., R. 51 E., M.D.B.&M., to the extent required to achieve and to maintain at Devil's Hole, Death Valley National Monument, a daily mean water level of 3.0 feet below the copper washer described in finding of fact No. 11.

II.

Order Continuing the Appointment of Special Master

With the consent of all counsel, Leonard C. Halpenny, President of Water Development Corporation, of Tucson, Arizona, was, on June 5, 1973, appointed Special Master with full power under Rule 53 of the Federal Rules of Civil Procedure to establish the maximum quantity of water that the defendants may pump from their wells in order to carry out the terms of the preliminary injunction, to keep a daily log and to file periodic reports.

It Is Ordered that the said Special Master is continued in office until further order of this Court to:

(a) Establish forthwith for each of the defendants' wells now existing or hereafter drilled, more fully described above in the final decree, the maximum quantity of water, if any, that may be pumped consistent with this Court's final decree, minimizing, whenever possible, the injury to defendants' livestock and agricultural pursuits.

(b) Keep a daily log of the quantities of water, if any, pumped from each of the said wells; maintain a record of the daily mean water level at Devil's Hole; and maintain such other records of his administration as the Special Master, in his judgment, shall be deemed necessary.

(c) Once a month, report fully in writing on his administration as Special Master.

III.

Award of Costs

Costs are awarded to the United States, the prevailing party, and against the defendants. Costs include reasonable fees and reasonable expenses of the Special Master incurred to date and to be incurred in the future in the enforcement of this Court's final decree.

Dated: April 9th, 1974.

/s/ Roger D. Foley
District Judge

2. Judgment of Affirmance

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, et al. Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. Nos. 74-1690 & 74-2186, D.C. No. Civil LV 1687.

APPEAL from the United States District Court for the District of NEVADA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of NEVADA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court, in this Cause be, and hereby is AFFIRMED AND REMANDED.

A True Copy
Attest 2/20/75
Emil E. Melfi, Jr., Clerk
By /s/ Ray Hewitt
Ray Hewitt, Senior Deputy

Filed and entered December 4, 1974.

3. Order Denying Rehearing

United States Court of Appeals, for the Ninth Circuit.

Filed: January 31, 1975

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants-Appellants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor, No. 74-1690.

United States of America, Plaintiff-Appellee, vs. Francis Leo Cappaert, Marilyn I. Cappaert, B. L. Barnett, Individuals, and Spring Meadows Ranch, Defendants. State of Nevada, ex rel. Roland D. Westergard, State Engineer, Intervenor-Appellant. No. 74-2186.

ORDER

Before: CARTER and CHOY, Circuit Judges, and SOLOMON,* District Judge.

The panel voted to deny both the appellants' and the intervenor-appellant's petitions for rehearing. Judge Choy voted to reject the suggestions for a rehearing en banc, and Judges Carter and Solomon have recommended the rejection of these suggestions.

The full court was advised of the suggestions for an en banc rehearing. No judge has requested a vote on these suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for a rehearing en banc are rejected.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix C

STATUTES INVOLVED

1. Federal Statutes

THE McCARRAN AMENDMENT, 43 U.S.C. § 666(a)

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where is appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

2. State Statutes

(a) The 1913 Nevada Act for the Adjudication of Water Rights, &c., now ch. 533 of the Nevada Revised Statutes, provides in pertinent part as follows:

533.010. *"Person" defined.* As used in this chapter, "person" includes a corporation, an associa-

tion, the United States, and the State, as well as a natural person.

533.025. *Water belongs to public.* The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.

533.030. *Appropriation for beneficial use.*

1. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise.

533.035. *Beneficial use: Basis, measure and limit of right to use.* Beneficial use shall be the basis, measure and the limit of the right to use of water.

533.450. *Orders, decisions of state engineer subject to judicial review: Procedure; appeals; appearance of attorney general.*

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order

or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

(b) The 1939 Nevada Act relating to Underground Waters, now ch. 534 of the Nevada Revised Statutes, provides in pertinent part as follows:

534.010(d). *Definitions.*

(d) "Percolating waters" are underground waters, the course and boundaries of which are incapable of determination.

2. As used in this chapter, the terms "underground water" and "groundwater" are synonymous.

534.020. *Underground waters belong to public; subject to appropriation for beneficial use; declaration of legislative intent.*

1. All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.